Supreme Court, U.S.
FILED

96 128 JUL 2 4 1996

OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States
October Term, 1996

DONALD A. SLATHAR,

Petitioner,

vs.

SATHER TRUCKING CORPORATION, AN IOWA CORPORATION; SATHER'S INC., A DELAWARE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael A. Pinotti, Esq.
Counsel of Record
Suite 270
203 East Little Canada Rd.
Little Canada, MN 55117
(612) 490-0624

John E. Thomas, Esq.
Of Counsel
24 East Fourth Street
St. Paul, MN 55101
(612) 298-1950

Attorney for Petitioner

1996 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

43 pp

QUESTIONS PRESENTED

1. Was it reversible error to reassert the employer's McDonnell-Douglas' presumptions into the jury's instructions?

2. Whether the exclusion of testimony from an informed non-decisionmaker who warned a decisionmaker about the legality of Mr. Slathar's pending discharge, reversible error?

3. As an alternative issue to question number 1, if McDonnell-Douglas instructions are to be used, did the lower court err by misapplying *Hazen Paper*?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit. [Supreme Court Rule 14.1(b)].

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... *i*

PARTIES TO THE PROCEEDINGS ..... *ii*

TABLE OF CONTENTS ..... *ii*

INDEX TO APPENDIX ..... *iii*

TABLE OF AUTHORITIES ..... *iii*

PETITION FOR WRIT OF CERTIORARI *1*

STATEMENT OF JURISDICTION *2*

THE STATUTE AT ISSUE *2*

STATEMENT OF THE CASE *2*

Procedural history *2*

Facts. *3*

REASONS FOR GRANTING THE WRIT *7*

ARGUMENT *12*

CONCLUSION *21*

INDEX TO APPENDIX

ORDER DENYING PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC. A-1

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT A-1

TRIAL COURT'S ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL A-10

EXCERPTS FROM THE DEPOSITION OF ANITA DARNELL A-12

MCDONNELL-DOUGLAS BASED-INSTRUCTIONS INSTRUCTING THE JURY ON THE DEFENDANT'S PRESUMPTION A-13

INSTRUCTIONS OFFERED BY SLATHAR A-14

THE MANUAL OF MODEL JURY INSTRUCTIONS.. A-14

TABLE OF AUTHORITIES

CASES

Blackwell v. Sun, Elec. Corp., 696 F.2d 1176, 1180 & n.5 (6th Cir. 1983) 9

Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326 (3rd Cir. 1995) 19

Cabrera v. Jakabovitz, 24 F.3d 372, 380 (2nd Cir. 1994) 9

City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) 11

EEOC v. Francis W. Parker School, 41 F.3d. 1073, 1075 (7th Cir. 1994), cert. denied, 115 S.Ct. 2577 (1995) 12

Gehring v. Case Corporation, 43 F.3d 340, 346 (7th Cir. 1995) 8

Grebin v. Sioux Falls Indep. School Dist. No. 49-5, 799 F.2d 18, 20 (8th Cir. 1985). 14

Hazen Paper Co., v. Biggins, 113S.Ct. 1701, 1707 (1993) 11, 16

Hicks v. St. Mary's Honor Center, 970 F.2d 487 (8th. Cir. 1992) 20

Icicle Seafoods, Inc., v. Worthington, 106 S.Ct. 1527, 1530 (1986) 18

Krodel v. Young, 748 F.2d 701 (D.C. Cir. 1984) 9

Loeb v. Textron, 600 F. 2d 1003 (1st Cir. 1980) 9

Lyon v. Ohio Education Ass'n & Professional Staff, 53 F.3d 135 (6th Cir. 1995) 12

McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879 (1995) 11

McKoy v. North Carolina, 494 U.S. 433 (1990) 12, 18

Memphis Community School District v. Stachura, 477 U.S. 299, 302 (1986) 12

Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986).... 10

Messina v. Kroblin Transportation Systems, Inc., 903 F.2d 1306, 1308-09 (10th Cir. 1990) 9

Mills v. Maryland, 486 U.S. 367 (1988) 12, 18

Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988) 9

Nelson v. J. C. Penney Company, Inc., 75 F.3d 343, pet. reh. denied (8th Cir. 1996) 21

Norfolk & Western Railway Co., v. Leipelt, 444 U.S. 490, 497 (1980) 12

O'Connor v. Consoldiated Coin Caterers Corporation, 1996 U.S. Lexis 2168, (1996) 13

Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989) 8

Scrand v. Federal Pac. Elec. Co., 851 F.2d 152, 156 (6th Cir. 1988) 10

St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2749 (1983) 5

Sutera v. Schering Corp., 73 F.3d 13 (2nd Cir. 1995)... 10, 20

Taggart v. Time, Inc., 924 F.2d 43, 47-48 (2nd Cir. 1991)... 16

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-255 (1981) 14

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) 9

United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714, n.3, (1983) 15

Walker v. AT & T Technologies, 995F.2d 846, 849 (8th Cir. 1993) 14

Wells v. New Cherokee Corp., 58 F.3d 233, 238 (6th Cir, 1995) 19

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. §§ 1291 and 1294(1) 2

29 U.S.C. § 623(1). 2

OTHER AUTHORITIES

Manual of Model Jury Instructions for the District Courts of the Eighth Circuit (September, 1992), ... 14

RULES

Rule 10(a) & Rule (c) 2

Rule 403 20

Rule 14.1(b). ii

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

DONALD A. SLATHAR,

Petitioner,

vs.

SATHER TRUCKING CORPORATION, AN IOWA CORPORATION; SATHER'S, INC., A DELAWARE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Donald A. Slathar, (hereinafter "Slathar") respectfully petitions that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered March 15, 1996, affirming the trial court's denial of a motion for a new trial. A petition for rehearing with a suggestion for rehearing en banc was denied on April 25, 1996.

STATEMENT OF JURISDICTION

Certiorari is sought under Rule 10 and 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the Eighth Circuit entered March 15, 1996. A petition for rehearing with a suggestion for rehearing en banc was denied on April 25, 1996.

THE STATUTE AT ISSUE

It shall be unlawful for an employer--

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms. conditions, or privileges of employment, because of such individual's age[.]" 29 U.S.C. § 623(1).

STATEMENT OF THE CASE

Procedural history.

A jury trial was held on January 3, 4, 5, 6, 9, and 10, 1995. Appropriate offers and objections were made to these instructions at issue on petition. Slathar's motion for a new trial was made denied on March 9, 1995. Petitioner appealed under 28 U.S.C. §§ 1291 and 1294(1) and the circuit court affirmed. Pet. Appx. A1. His petition for rehearing with a suggestion for rehearing en banc was denied on April 25, 1996. *Ibid.*

Facts.

Petitioner acknowledges the appeals court and the trial court presented the factual issues well. Pet. Appx. 1-10.[1] A brief summary here will show reasons why the excluded testimony of the human resource professional, Ms. Anita Darnell, was reversible error.

Sathers, Inc., acquired a business known as Powell's Candies, Inc., in November, 1992. Sathers claimed that on or about January 28, 1994, they decided to "eliminate" the position of Mr. Donald Slathar.

Petitioner a well-qualified individual with over 30 years in the maintenance, acquisition, and design of confectionery business machines. His base salary was $84,000, and, due to his performance, he received over $20,000 in bonuses on his 1991 W-2 from. Pl's Trial Ex. 14.[2] Mr. Robert Fraser, the former chairman of Powell's, testified that Mr. Slathar's primary skill was in maintaining a positive equilibrium between those persons who operated the machines and the maintenance personnel who maintained them. Trans, p. 197-98.[3] That primary skill coupled with Mr. Slathar's experience saved Powell's candy over $500,000 annually, far more than enough to cover Mr. Slathar's salary. *Ibid*, p. 196.

---

1 "Pet. Appx. refers to the appendix attached to this petition.

2 This abbreviation refers to Plaintiff's trial exhibit numbered 14. This item and other similar ones, such as exhibits and the transcript, cited in this petition can be reproduced later, under Rule 26.

3 "Trans." refers to the trial transcript

When Mr. Slathar gained knowledge that his position was eliminated, he questioned the decision by telling Mr. Lindborg, the general manager at Powells, that the plant needed someone like him to maintain it. Trans. 27. Sure enough Sathers planned for two to three people to fill his position; a maintenance supervisor, a manufacturing supervisor, and a general foreman. *Ibid*, at 471-472, 855. Mr. Slathar's duties were assumed by persons under forty who made less than he. Some of his duties, were assumed by Rick Vos, who was promoted into this position, a Michael Thorsen, hired in as a new maintenance supervisor, and Mr. David Thompson, who took over some of Mr. Slathar's plant performance analysis. *Ibid*, 31-33, 158-160, 268 & 293. Messers. Vos and Thompson were both in their thirties and received about $35,000 in an annual salary.[4] Sathers additionally engaged the services of two to three independent contractors to perform the work Mr. Slathar had managed for Sathers. These contractors included Beckers of Minneapolis, Minnesota, Southern Enterprises, in Baton Rouge, Louisiana, and a firm from Japan. *Ibid*, at 172, 500, & 544.

An immediate and, at the time, mutually exclusive reaction was made to Sathers January 28, 1992, decision to terminated Slathar, by Ms. Anita Darnell, the human resource manager for Sathers' Powells facility. Pet. Appx. 12-13. Her reaction and explicit warning with a decsionmaker was excluded from the jury. *Ibid.* One such conversation was relayed to one of the persons, Mr. Douglas Pendgraft, admittedly involved in the decision to terminate Mr. Slathar.

---

[4] Mr. Vos received a quick raise in August, 1992 to $40,000. Mr. Thompson had more plants to analyze than the Powells facility. Still Mr. Slathar possessed those skills.

She told her boss Mr. Pendgraft that she saw the decision as risky under the age and disability discrimination laws.[5] *Ibid.* Ms. Darnell had eighteen years of experience as a human resource professional who saw the decision as very poor. Pet. Appx. 12.

The impact of this excluded testimony when added to the her allowed testimony would have placed the issue of an illegal motivation and pretext squarely in the jurors' minds. Slathar understands *Hicks* to state that this is the issue to be resolved. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2749 (1983). Ms. Darnell was allowed to testify that she observed Mr. Vos performing many of Mr. Slathar's former duties. Trans. 243-244.

Slathar ought to have been able to relate Ms. Darnell's initial reaction to the termination decision to her observation of what Mr. Slathar's replacement performed, through evidence and argument. Correlating her "risky" observations with her 'admitted' testimony she could have explained that saw the representation that Mr. Donald Slathar's position as eliminated was highly questionable, since the services he performed were needed within the plant. Pet. Appx p. 12-13.

The appeals court focused too narrowly on Sathers' first decision to terminate Mr. Slathar. Pet. Appx. 7. At least two decisions were made one near January 31, 1992, and the other when Sathers decided to ignore Ms. Darnell's advice and continue on with the actually termination on March 27, 1992. Within this two month period, Sathers placed Mr. Vos into his new job, changed the job descriptions of Michael

---

[5] Mr. Pendgraf was one of the four persons who made the decision to terminate Mr. Donald Slathar.

Thorsen and Rick Bolnick, began to advertise for the position ultimately filled by David Thompson. One reason another executive gave to the committee who made the decision to terminate Mr. Slathar, was that he was overly qualified. Trans. 454.

Plaintiff sued for age discrimination and Sathers defendant that the decision was a part of its reduction in force.

At the charge conference Slathar objected to the 'business judgment' instructions, based on the same reasoning that supports the *Hicks*, decision. Trans. 678. Senior District Judge Donald D. Alsop overruled Slathar's objection. The following instructions were then given:

> "The progression of age is a universal process. Thus, it is apparent that in the usual case, older workers are constantly moving out of the labor market while younger workers come in. Thus, there is not an automatic presumption of discrimination where a younger worker replaces an older one.
>
> "When an employer's decision is wholly motivated by factors other than age, there is no discrimination. This is even true if the factor motivating the decision to terminate is typically correlated with age; such as pension status, salary, or seniority. The *ADEA* does not make it illegal to terminated an employee simply because he is Paid a high salary.
>
> "An employer is not required to reassign employees whose jobs are eliminated or put

employees in a lower echelon, poorer paying jobs with substantial reductions in responsibilities and salary. The issue is ultimately whether the {sic} age was a determining factor in he decision to discharge the employee, in this case Donald Slathar.

"You are instructed that the focus of your consideration must be upon Sathers' motivation, and not on your own consideration of Sathers' business judgment regarding the organization changes that they made. The issue is whether or not Sathers discriminated against Mr. Slathar because of his age." Pet. Appx. 13.

Slathar also argued that the instruction was in the negative, it down played commonly relied upon circumstantial evidence. Judge Alsop then suggested Plaintiff develop affirmative instructions. Plaintiff then offered the following instructions:

"if you f[ind] Don Slathar's was discharged because of his pay, you may consider his pay is tied to his experience and age." Pet. Appx. 14.

The trial court rejected this proffered instruction by ruling that *Hazen Paper* authorized the exclusion. After about two days of deliberations the jury return a defendant's verdict.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's application of this Court's decision in *St. Mary's Honor Center vs. Hicks*, 509 U.S. 502, 506, 510. 113 S.Ct. 2742, 2749 (1993), to the jury instructions conflicts with:

1. The *Hicks'* decision regarding when the McDonnell-Douglas presumptions or procedural burdens cease, and,
2. Other courts' decisions regarding whether to instruct a jury after *Hicks*, regarding the procedural burdens. Rules 10 (a) and 10 (c).

Slathar, conflicts with the principles established in *Hicks*, concerning when the procedural burdens cease in discrimination cases. It is likely that this important federal issue will recur unless it is addressed and decided by this Court, which has not been previously decided. *Slathar*, also conflicts with *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989), holding that it was err to reassert the defendant's burden (there, the plaintiff was not as skilled as his replacement) into the jury instructions.

The Eighth Circuit's holding in *Slathar*, directly conflicts with the Seventh Circuit's holding in *Gehring v. Case Corporation*, 43 F.3d 340, 346 (7th Cir. 1994), cert. denied 115 S.Ct. 2612 (1995). In *Gehring v. Case Corporation*, that court affirmed the trial court's decision **not** to give a McDonnell-Douglas, burden-shifting instruction. In reasoning, the same upon which Mr. Slathar stated to the trial court (Trans. p. 678), the Seventh Circuit ruled:

> "The judge declined, for the very good reason that the Supreme Court has held that this burden shifting model applies to pretrial proceedings, not to the jury's evaluation of the evidence." *Gehring*, 45 F.3d p. 343. A reading of the statute, itself, would lend support to this interpretation. Ibid, at 346.

Other federal Circuits have or continue to instruct their juries only on the ultimate issue. *Loeb v. Textron*, 600

F. 2d 1003, 1010 (1st Cir. 1980); ([w]e conclude that the operative principles behind McDonnell Douglas are applicable in age cases as in Title VII cases, but that the McDonnell Douglas formula is not to be read in full to the jurors). *Krodel v. Young*, 748 F.2d 701 (D.C. Cir. 1984); *Cabrera v. Jakabovitz*, 24 F.3d 372, 380 (2nd Cir. 1994); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1137 (4th Cir. 1988); *Blackwell v. Sun, Elec. Corp.*, 696 F.2d 1176, 1180 & n.5 (6th Cir. 1983); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1344 (9th Cir. 1987); and, *Messina v. Kroblin Transportation Systems, Inc.*, 903 F.2d 1306, 1308-09 (10th Cir. 1990).

The state Court of Appeals of Maryland recently rejected another type of presumption-asserted statements in the jury instructions, but on different grounds. *Molesworth v. Brandon, et al.*, 70 FEP 524 (Md. App. 1996). In reversing the state's circuit court the appeals court reasoned that the "same actor inference" was not applicable in that case, because there was direct evidence of discrimination, citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Brandon*, at 527. This state court decision also cites to several federal circuit courts showing that there is a movement among the courts to reassert, at least, the employer's burdens into jury instructions.[6]

With the direct conflict between the Eighth Circuit and this Court, coupled with the different interpretation

---

[6] The following circuit courts have approved the use of a jury instruction on the "same actor inference" in *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991). *Buhrmaster v. Overnite Transportation Co.*, 61 F.3d 461 (6th Cir. 1995). *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173 (8th Cir. 1992).

between the competing opinions, cited above, the time is ripe to review this issue.

b. Exclusion of testimony between an informed professional with a decisionmaker, concerning professional's observation that the proposed discharge was questionable.

Some circuit courts, including the Eighth Circuit, have ruled that statements made by the non-decisionmakers are not probative to the issue of pretext or illegal motive. Pet. Appx. 7. *Scrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988). Other circuits have refused to issue such a blanket rule. Infra, 17-18. *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326 (3rd Cir. 1995); and, *Sutera v. Schering Corp.*, 73 F.3d 13 (2nd Cir. 1995).

Slathar, also conflicts with this court's application of the agency principles in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986), employer is responsible for actual or constructive knowledge of its superiors' wrongful conduct. These decisions also conflict with the ultimate issue in *Hicks*. 509 U.S. at 610. Admissibility of material conversations with the decision-makers is the central issue of fact in *Hicks*. Without a direct admission against interest, this type of direct evidence is the closest a discharge employee is offer at a trial.[7] The Eighth Circuit's decision in *Slathar*, represents the contrary view, that unless the testimony is by an actual decision maker, it is not admissible to prove that age was a factor in the decision.

---

[7] This Court acknowledged that it would be rare indeed for a there to be an eye-witness to a discriminatory decision. *Hicks*, 113 S.Ct. at 2755, citing Aikens, 460 U.S. at 716.

c. If there is to be McDonnell-Douglas type instructions, then the Eighth Circuit misapplied *Hazen Paper.*

By stating that it was not reversible err to refuse to instruct the jury, that Mr. Slathar's experience, salary, and age can be viewed together as circumstantial evidence of an age-based decision, the Eighth Circuit misapplied *Hazen Paper. Hazen Paper Co., v. Biggins*, 113 S.Ct. 1701, 1707 (1993). The Eighth Circuit's opinion also conflicts with portions of the holding in *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995). *Slathar*, allowed the exclusion of an affirmative jury instruction on the use of specific kinds of circumstantial evidence, by misreading *Hazen Paper* to apply only to inaccurate stereotyping. Pet. Appx. 9-10. *Hazen Paper* ruled that pension vesting requirements can be analytically distinct from an age-based decision. 113 S.Ct. at 1307. Since the employee in *Hazen Paper* presented additional circumstantial evidence that his age was used against him, the case was remanded back to the First Circuit. 113 S.Ct. at 1708.

In *McKennon*, this Court reasoned the ADEA "reflects a societal condemnation of invidious bias in employment decisions ... [that is] part of a wider statutory scheme to protect employees in the workplace nationwide." 115 S.Ct. at 884. By analogy, *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), this Court held that the use of accurate, nonstigmatizing stereotypes violated Title VII. These reasons should be incorporated into ADEA cases.

There is circuit conflict with *Hazen Paper*, and *McKennon*, on this issue. The Seventh and Sixth Circuits hold, essentially, the essence of the ADEA's prohibitions is

based on 'inaccurate stereotyping" and the fact that older workers were likely to have more years of experiences was neither inaccurate or stigmatizing. See, *EEOC v. Francis W. Parker School*, 41 F.3d. 1073, 1075 (7th Cir. 1994), cert. denied, 115 S.Ct. 2577 (1995). See also, *Lyon v. Ohio Education Ass'n & Professional Staff*, 53 F.3d 135 (6th Cir. 1995).

Issues present within this petition will continue to recur unless this Court squarely addresses them by granting the writ.

ARGUMENT

a. Jury instructions.

1. Standard of Review for erroneous jury instructions.

Where an error of law or the omission of a legal standard occurs in the jury instructions, resulting in material or clear error, a new trial has been result of this Court's decisions in many case, including *Patterson v. McLean Credit Union*, 491 U.S. at 180; *Norfolk & Western Railway Co., v. Leipelt*, 444 U.S. 490, 497 (1980); *Memphis Community School District v. Stachura*, 477 U.S. 299, 302 (1986). New trials have been the result of this Court were a jury is instructed to avoid consideration of evidence. *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990).

It is incumbent on this Court to apply the *Hicks*, burden of proof principles to the jury instructions in pretext cases.

2 McDonnell Douglas jury instructions are erroneous under *Hicks*.

This Court made it abundantly clear in *Hicks*, that once each party presents evidence to establish there respective burdens, they drop out of the case, allowing the factfinder to determine whether a motivating reason for the employee's termination was intentional discrimination. *Hicks*, 113 S.Ct. 2749-2750.[8] For this Court's understanding to reach juries across this nation, it must grant this petition to review the Eighth Circuit's decision.

A direct conflict in reasoning, but in a different type of discrimination case, the court need only look to *Patterson*, 491 U.S. 188. Circuit courts are straying from this simple holding by reasserting presumptions into jury instructions. Direction from this Court is warranted to resolve these issues and this case on petition squarely presents the questions for review.

Below the trial court reasserted the defendant's procedural burden into the jury instructions and down played commonly used items of circumstantial, materially misstated the law. Pet. Appx. 13. Sathers asked for and received a presumption of validity by the trial judge to its 'business judgment' decision. *Ibid.* Under *Hicks*, that presumption ceased to exist after defendant's motion for summary judgment and judgment as a matter of law were denied. 113

---

[8] This Court has never decided whether the McDonnell-Douglas framework applies to cases arising under the ADEA. *O'Connor v. Consoldiated Coin Caterers Corporation*, 1996 U.S. Lexis 2168, at 5 (1996) citing, *Hicks*, 509 U.S. at 506 n.1.

S.Ct. 2753-54, applying *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). For the trial court to reassert it at the instruction phase of the trial demonstrates a direct conflict with this Court's holding in *Hicks*.

Federal Circuit courts should adopt *Hicks*, as reemphazied in *Gehring v. Case Corporation*, 43 F.3d at 346 340. The Seventh Circuit ruled:

> "The judge declined, for the very good reason that the Supreme Court has held that this burden shifting model applies to pretrial proceedings, not to the jury's evaluation of the evidence.' *Gehring*, 45 F.3d p. 343. A reading of the statute, itself, would lend support to this interpretation. " *Ibid.*

In *Slathar*, the Eighth Circuit held that McDonnell-Douglas based instructions should be used. Pet. Appx. 5-6.

The Eighth Circuit originally said that it was unnecessary and inadvisable to instruct the jury regarding the three-step analysis of McDonnell Douglas. *Manual of Model Jury Instructions for the District Courts of the Eighth Circuit* (September, 1992), citing, *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 799 F.2d 18, 20 (8th Cir. 1985). See Pet. Appx. 14. The change came with *Walker v. AT & T Technologies*, 995 F.2d 846, 849 (8th Cir. 1993); which held that a far less controversial business necessity instruction

must be given.[9] Judge Gibson, who wrote the opinion, stated that business necessity was a substantive issue. See, 995 F.2d at 849 (wherein he wrote "[t]hus we conclude that A T & T had the right to have the jury instructed as to this principle of substantive law, particularly on the record before us." *Ibid.* The opinion in *Walker* was issued ten (10) days before this Court's decision in *Hicks.*

Judge Gibson is still partially correct that the issue is substantive, but it is only for the court, after *Hicks,* and not the jury. *Hicks*, 113 S.Ct. at 2753, 2756.

In *Slathar,* the jury was further instructed that certain types of circumstantial evidence was not to be considered in their deliberations, when the court said:

> "When an employer's decision is wholly motivated by factors other than age, there is no discrimination. This is even true if the factor motivating the decision to terminate is typically correlated with age; such as pension status, salary, or seniority. Pet Appx. 13.

It is well-settled under this Court's opinion in *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714, n.3, (1983), that the plaintiff in a Title VII case may

---

[9] The *Walker,* instructed: "[t]he ADEA is not intended as a vehicle for judicial review of employment decisions which are not brought about by reason of age or age bias. The law protects older employees from being treated more harshly then they would have been if they were young. However, an employer does have a right to make business decisions – to assign work, to change and employee's duties, to transfer, demote or discharge an employee for good reason or no reason at all, absent intentional age discrimination." *Walker*, 995 F.2d at 849.

satisfy their ultimate burden of persuasion by presenting nothing more than circumstantial evidence. The *Slathar,* court's instructions, confused a reasonable jury into thinking that an employer's decision, viewed through common items of circumstantial evidence, such as, age, salary, experience, seniority, or pension status, is not evidence of an illegal motivation. The trial court misapplied *Hazen Paper Co., v. Biggins*, 507 U.S. 604, 613, 113 S.Ct. 1701, 1707-8 (1993), for that decision held that pension status and other factors may combine to create an issue of fact for trial. *Ibid,* at 1708. As the *Hazen Paper,* court stated:

> "Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age.' *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly. *Hazen Paper,* 507 U.S. at 610.

For reasons inapposite to those stated in *Hazen Paper,* and *Criswell*, Sathers terminated Mr. Slathar since he was a very productive employee, who had earned and maintained his usefulness with his employer, so that he achieved his salary and position. The fact that Sathers replaced Petitioner with four to five people, plus subcontractors, speaks loudly that Mr. Slathar's age and experience as a fully productive employee, was used against him to justify his termination. The Second Circuit has held that " the ADEA commands that 'employers are to evaluate once an employer stigmatizes the discharged employee's abilities as too good,' such motivation correlates with age." *Taggart v. Time, Inc.*, 924 F.2d 43, 47-48 (2nd Cir. 1991) (employer's assertion that 59 year old former employee of

dissolved subsidiary was overqualified for position that was given to 41 year old person, was evidence of a pretext). Since Mr. Slathar was also not allowed the opportunity to work any of the 'new' positions created by Sathers, such may be evidence of discrimination. *Hall v. Western Products, Co.*, 988 F.2d 1050 (10th Cir. 1993), [when a party is not offered any of the new positions created, that can be consider evidence of discrimination].

The trial court's reassertion of the defendant's presumption into the jury instruction, materially misstated the law at the point in the litigation, by prejudicing the employee with an instruction that negated their deliberation away from much of the circumstantial proof going to the ultimate issue of motivation.

For these reasons, especially the direct conflicts with this Court, Mr. Slathar asks this Court to grant his petition.

b. Admissibility of evidence showing intentional knowledge.

1. Standard of Review.

New trials have been the result of this court were a jury does not hear certain evidence or is instructed to avoid consideration of evidence. *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990). This Court has held that review of legal errors is to be conducted de novo, under the abuse of discretion standard. *Icicle Seafoods, Inc., v. Worthington*, 106 S.Ct. 1527, 1530 (1986); (where factual findings assailable, but an erroneous view of the law occurs, the appellate court should reverse the district court on an abuse of discretion standard of review. Errors in the

introduction, exclusion or evaluation of evidence or fact, are reversible when they influence errors of law. *Aikens*, 460 U.S. at 716. *Hazen Paper*, 510 U.S. at 610.

2. Review should be granted.

The *Slathar* appellate court ruled the trial was within its discretion to exclude the evidence of Ms. Darnell's conversations with the Director of Human Resources and the President of Sather's Powells facility. Pet. Appx. 7.

We ask this court to review these ruling, ordinarily left to the discretion of the trial judge, for it is err to exclude evidence offered for the purpose of establishing the illegal motivation. To hold otherwise, prevents a party from proving their case, with prejudicial evidence. Under *Hicks*, after the presumptions are rebutted, the "issue for the factfinder is intent". *Hicks*, 113 S.Ct. at 2749. These presumptions drop out of the case. *Ibid*, at 2747, *Burdine*, 450 U.S. at 254-55.

The *Slathar*, decision conflicts, in principle, with another decision from the same circuit that reversed a judgment based on a jury verdict, when similar evidence was lacking. In *Nelson v. J. C. Penney Company, Inc.*, 75 F.3d 343 (8th Cir. 1996), because there was no evidence to establish pretext or a discriminatory motive.

The Third Circuit in *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326 (3rd Cir. 1995), reversed a trial court's grant of summary judgment. The court held, in part, that the CEO causally unrelated remarks, in a company newsletter about "star" "young" men who were the company's future, was probative to the issue of the company's culture circumstantially showing an anti-age bias.

The Sixth Circuit in *Wells v. New Cherokee Corp.*, 58 F.3d 233, 238 (6th Cir, 1995), held that testimony from a non-decision maker stated that this plaintiff was terminated due to her age was fully admissible. The Wells, court stated:

> "courts must consider as probative evidence any statements made by those individuals who are in fact meaningfully involved in the decision to terminate an employee." *Ibid.*

While the appeal was taken from a refusal to instruct the jury on how to treat such, this case points to the importance of having such evidence when prosecuting an age-based case. It also appears to be a departure of the Sixth Circuit's holding in *Schrand v. Federal Pac. Elec. Co.*, relied upon by the *Slathar*, court. Pet. Appx. 7.

The Second Circuit held in *Sutera v. Schering Corp.*, 73 F.3d 13 (2nd Cir. 1995), that evidence of harassing and demeaning reference to his age was evidence of pretext, in reversing a trial court's grant of summary judgment.

Combining the use of McDonnell-Douglas instructions and the exclusion of Anita Darnell's testimony also shows a disparity with *Hicks*, in that the issue for the jury is whether the illegal motive played a determining factor in the employer's decision. 113 S.Ct. at 2749, 2756. Excluding the evidence shows that the Eighth Circuit still misunderstands such evidence as not going to the material issue of the case. Put another way, the issue as framed by the Eighth Circuit is more focused on the employer's stated reason, rather then (as it should be) on whether an illegal motive played a motivating

factor in the decision.[10] Several circuits have adopted this testimonial evidence as critical to the resolution of age discrimination. The trial court excluded this evidence. It found the probative value outweighed by the prejudicial impact of the statements, under Rule 403. While all concerned admits that Sather's first decision was to **inform** Mr. Slathar that he **would be** terminated in late January, 1992, he was not **actually terminated** until March 27, 1992. Sathers had two months in which to review their decision, in light of Ms. Darnell's warning. Pet. Appx. 12. Motivated by Mr. Slathar's age, Sathers ignored Ms. Darnell and replaced Mr. Slathar with at least two to three younger individuals, whose combined salaries were close to what Petitioner made.[11]

Petitioner concedes that Ms. Darnell's excluded testimony would have been damaging and, therefore, prejudicial to Sathers. So the issue is whether the trial court's exclusion, that its prejudicial impact outweighed the probative value, was clearly erroneous. The Second, Third, and Fourth Circuits have reversed trial courts that excluded similar evidence. The Eighth Circuit has reversed judgments entered upon a jury verdict, for the absence of such information.

---

[10] The Eighth Circuit's decision in *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th. Cir. 1992), held that since the employer's stated reason was found to be a pretextual, judgment must be entered for the employee. It then reversed a trial court's finding for the employer. This Court then reversed the Eighth Circuit's decsion in *Hicks*, stating the factfinder's rejection of the employers will permit, but not require the trier of fact to infer the ultimate fact of intentional discrimination. 113 S.Ct. at 2749.

[11] The jury should have heard the evidence, as argued above, before deliberating for two days.

Nelson v. J. C. Penney Company, Inc., 75 F.3d 343, pet. reh. denied (8th Cir. 1996).

Mr. Slathar asks the Court to grant this petition and issue the writ to the Eighth Circuit to address the exclusion of this very probative evidence under *Hicks*, and *Hazen Paper*.

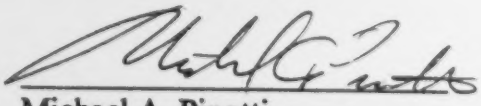
c. Instructing the jury on the inapplicability of circumstantial evidence in a discrimination case.

It is our view that McDonnell-Douglas based instructions are erroneous, so this issue is in the alternative to Question 1. Petitioner, alternatively, seeks review based on arguments already stated herein.

CONCLUSION

Mr. Slathar petitions this court to grant a writ of certiorari to the Eighth Circuit Court of Appeals to review these questions that are at the cornerstone of how ADEA jury trials will be conducted, after *Hicks*, and *Hazen Paper*.

Respectfully Submitted,



Michael A. Pinotti
Suite 270, 203 E. Little Canada Road
Little Canada, MN 55117-1300
612-490-0624

Attorney for Petitioner

APPENDIX

ORDER DENYING PETITIONER'S DONALD A. SLATHAR'S PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC

THE PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC BY DONALD A. SLATHAR IS HEREBY

DENIED, APRIL 25, 1996.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-1864
No. 95-2003

Donald A. Slathar,

Appellant/Cross-Appellee,

v.

Appeals from the United States District Court for the District of Minnesota

Sather Trucking Corporation, an Iowa corporation; Sather's, Inc., a Delaware corporation,

Appellee/Cross-Appellant.

Submitted: December 13, 1995

Filed: March 15, 1996

Before McMILLIAN, JOHN R. GIBSON, and BEAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Donald Slathar appeals the judgment entered following an adverse jury verdict in his Age Discrimination in Employment Act claim, 29 U.S.C. §§ 621-634 (1994), alleging he was wrongfully terminated because of his age. Slathar argues that the district court[1] erred by (1) instructing the jury on business judgment, (2) not allowing a former Sather's human resource manager to testify, and (3) refusing to strike part of the company's closing argument. We affirm.

[- 1-]

Slathar was born in January 1935. He began working for Powell's Candies, Inc., a candy manufacturer, in 1976. Slathar's duties included supervising maintenance in the facility, keeping the equipment running, designing equipment, and plant engineering.

In November 1991, Sather's purchased the Powell's facility. Shortly thereafter, the company began restructuring

---

[1] The Honorable Donald D. Alsop, Senior Judge, United States District Court for the District of Minnesota.

the Powell's organization to more closely reflect Sather's organizational structure. Powell's maintenance department had always designed and built equipment in-house. In contrast, Sather's policy was to purchase equipment on the open market.

In January 1992, Sather's informed Slathar that he was being terminated in March. The company claimed Slathar's position as a design engineer was no longer needed, and his position was being eliminated. Slathar believed he was being fired because of his age, and replaced as maintenance supervisor by Ricky Vos, a Sather's employee in his thirties, who was transferred to the former Powell's facility to serve as Maintenance General Foreman.

Slathar sued Sather's. Following the pre-trial conference the district court dismissed Sather Trucking as a defendant and dismissed Slathar's tortious interference claim. The jury returned a special verdict on Slathar's Age Discrimination in Employment Act claim, finding that Slathar's age was not a determining factor in the company's decision to discharge Slathar. Based on the verdict, the district court made a finding of fact in Slathar's Minnesota age discrimination claim that the company did not discriminate against Slathar on the basis of age. The court entered judgment against Slathar and he appeals.

[- 2-]

I. Slathar argues that the district court erred by instructing the jury on business judgment. He contends this instruction increased his burden of proof and materially misstated the law. He also argues that it was error to refuse to instruct the jury that if it found he was discharged because of his pay, they could consider that his pay was tied to his experience and age.

The district court instructed the jury that they must find for Slathar if age was a determining factor in his termination, and age is a determining factor only if the company would not have terminated Slathar but for his age.

The court went on to instruct that an employer has the right to make business decisions, absent intentional age discrimination, "even if the factor motivating the decision to terminate is typically correlated with age; such as pension status, salary or seniority." The court submitted special interrogatories to the jury, and the jury specifically found that age was not a determining factor in Slathar's discharge.

"We review the district court's formulation of jury instructions for abuse of discretion. We must determine whether the jury instructions, taken as a whole, fairly and adequately submitted the issues in the case to the jury." *Transport Ins. Co. v. Chrysler Corp.*, 71 F.3d 720, 723 (8th Cir. 1995) (citations and internal quotations omitted). "[T]he form and language of jury instructions are committed to the sound discretion of the district court so long as the jury is correctly instructed on the substantive issues in the case." *Walker v. AT & T Technologies*, 995 F.2d 846, 849 (8th Cir. 1993) (quoting *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir.), cert. denied, 506 U.S. 1014 (1992)).

"The ADEA is not intended to be used as a means of reviewing the propriety of a business decision." *Gaworski v. ITT Commercial*

[- 3-]

Fin. Corp., 17 F.3d 1104, 1110 (8th Cir.), (quoting *Jorgensen v. Modern Woodmen of Am.*, 761 F.2d 502, 505 (8th Cir. 1985)), cert. denied, 115 S. Ct. 355 (1994). In Walker, 995 F.2d at 849, we held that, on the record there before us, the employer was entitled to have the jury instructed "that an employer may exercise business judgment in making personnel decisions." An employer has the right to make business decisions, so long as they are made in a nondiscriminatory manner. See, *Walker*, 995 F.2d at 849-50.

Even if Slathar was terminated because of his high salary, age discrimination cannot necessarily be inferred. See

Bialas v. Greyhound Lines, 59 F.3d 759, 763 (8th Cir. 1995). Slathar's "status as an experienced and thus higher paid employee [ ] does not in itself permit an inference of age discrimination." *Serben v. Inter-City Mfg. Co.*, 36 F.3d 765, 766 (8th Cir. 1994) (per curiam), cert. denied, 115 S. Ct. 1402 (1995). Age discrimination may exist when an employer terminates an employee based on a factor such as experience or salary when the employer presupposes a correlation with age and uses that factor as a proxy for age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612-13 (1993). However, a decision to terminate an employee solely because of salary or length of service is not age discrimination. *Ibid.* at 611. Age and these other factors are analytically distinct. *Ibid.*

Relying on *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), Slathar argues that the court's instruction confused the substantive issues that the jury was supposed to decide, somehow injecting procedural issues into the jury's decision and effectively increasing his burden of proof. *St. Mary's Honor Center*, 113 S. Ct. at 2746, was a Title VII case tried to the court. The Court's discussion of McDonnell Douglas burden shifting offers no support for Slathar's argument. Reading the instructions as a whole, it is evident that the jury's consideration was directed to whether age was the determining factor in the decision to discharge Slathar, and Slathar had the burden of proving that he

[-4-]

was discharged because of his age. While the instruction dealt with business judgment, pension status, salary, and seniority, the instruction plainly stated the ultimate issue for the jury's determination. See *Walker*, 995 F.2d at 849; *Hazen Paper Co.*, 507 U.S. at 611-613. The district court did not abuse its discretion by giving the proffered instruction.

Furthermore, the district court did not abuse its discretion by refusing to instruct the jury that if it found that

Slathar was discharged because of his pay, it could consider that his pay is tied to his experience and age. In proposing this instruction, Slathar misconstrues the Court's statement in *Hazen Paper Co.*, 507 U.S. at 612-13, which noted that age discrimination may exist when an employer uses another factor as a proxy for age. The Age Discrimination in Employment Act requires that an employer not discriminate based on age. It does not require an employer to ignore an employee's other characteristics. The ultimate test is whether the company discriminated against Slathar because of his age, and the district court properly instructed the jury on this question.

II. Slathar next argues that the district court should have admitted the testimony of Anita Darnell, a former human resources manager at Sather's, regarding a phone conversation she had with Douglas Pendgraft, the Sather's Corporate Director of Personnel. Darnell said that she did not participate in the decision to terminate Slathar. Upon learning that Slathar had been terminated, Darnell telephoned Pendgraft and informed him that she believed terminating Slathar was a risky decision because Slathar was in a protected group based on his age and perhaps his disability. Pendgraft responded "that Sather's would take care of it."

[-5-]

The district court refused to allow Darnell's testimony on this subject, finding it was irrelevant under Federal Rule of Evidence 401 because Darnell had not participated in the employment decision, the conversation took place after the decision to terminate Slathar had been made, and it amounted to nothing more than her opinion regarding the company's potential exposure. Further, the court found that the value of the proposed testimony was far outweighed by its prejudicial impact. See Fed. R. Evid. 403.

"Admission of Evidence is a matter for the district court's discretion and we will defer to the district court's

ruling absent an abuse of discretion." *Morgan v. Arkansas Gazette*, 897 F.2d 945, 952 (8th Cir. 1990). Stray remarks and statements by nondecisionmakers are not direct Evidence of discriminatory motive. See *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991). Darnell's testimony that she told a senior manager that Slathar was in a protected class is not evidence of discrimination. See *Bashara v. Black Hills Corp.*, 26 F.3d 820, 823-24 (8th Cir. 1994) (holding that human resources manager's expression of concern over possible age discrimination claim was the "equivalent of a stray remark" and did "not constitute evidence of discriminatory animus").

Darnell was not involved in the decision to terminate Slathar, and she Did not offer her opinion of the decision until after it had been made. Pendgraft's response is much too ambiguous to be considered any sort of admission by company management, and it is not Evidence of discriminatory intent.

The impact of Darnell's testimony would have been quite prejudicial. "Although it had no direct bearing on the issue to be decided . . . this testimony embellished the circumstantial evidence directed to that issue by adding `smoking gun' type Evidence," the opinion of a company manager. *Schrand v. Federal*

[-6-]

Pac. Elec. Co., 851 F.2d 152, 156 (6th Cir. 1988). Such prejudice substantially outweighs any probative value the proposed testimony might have. The district court Did not abuse its discretion by excluding Darnell's testimony.

III. Slathar contends that the district court erred by not striking a portion of the company's closing argument. Addressing the issue of damages and referring to the testimony of Slathar's expert Varns, the company argued:

[L]adies and gentlemen, you'll recall Mr. Varns stated

Mr. Slathar drew nine to eleven weeks of unemployment compensation. He worked 46 out of the 52 weeks that year, and yet he's drawing unemployment compensation, making $21.00 an hour, 32 to 40 hours a week. Take a look at the exhibit when you get back there. Ladies and gentlemen, that's a fraud against the State.

The district court overruled Slathar's objection to this argument. Slathar now argues that we should grant a new trial because this argument was based on evidence not contained in the record.

"[C]losing arguments are made under the direct control of the trial court. We will not disturb the court's ruling unless an abuse of discretion occurred. To constitute reversible error, statements made in closing argument must be plainly unwarranted and clearly injurious." *P*earce v. Cornerstone Clinic for Women, 938 F.2d 855, 859 (8th Cir. 1991) (citations omitted).

The company's argument addresses both damages and Slathar's credibility as a witness. Both parties argue the substantive issue of whether Slathar violated Minnesota law and actually committed fraud on the state. Whether Slathar committed fraud on the state is certainly not a question for us to Decide here, and it was not an issue for the jury in this age discrimination case. Counsel's

[- 7-]

conclusion that Slathar committed a fraud against the state, in our view, exceeds the bounds of zealous advocacy.

However, the district court instructed the jury several times that statements of counsel were not Evidence in the case. Further, in denying Slathar's motion for a new trial, the court stated that the comment of defense counsel "was clearly not outcome determinative." We cannot conclude that this one sentence in the midst of the entire trial is so egregious as to warrant reversal. See Moses v. Union *P*ac. R.R., 64 F.3d

413, 417 (8th Cir. 1995); (holding that "[a]lthough we strongly disapprove of defense counsel's closing argument, we decline to reverse because plaintiff has failed to make a showing of prejudice").

We affirm the decision of the district court. Because we affirm, we need not reach the issues raised in the company's cross appeal.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

TRIAL COURT'S ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

DONALD A. SLATHAR, 3-93 CIV 256

Plaintiff,

v.

Sathers, Inc.,

Defendant.

This matter comes before the Court upon Donald A. Slathar's motion for a new trial under Rule 59 of the federal rules of Civil Procedures. Slathar argues the court made prejudicial errors in the jury instructions, in failing to admit the testimony of Anita Darnell, and failing to strike defense counsel's comment regarding "fraud on the state of Minnesota."

Rule 59 of the Federal Rules of Civil Procedures allows the trial court to grant a new trial:

> to all or any of the parties and on all or part of the issues ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions in law in the courts of the United States ...

The authority to grant a new trial is "confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 101 S.Ct.

[-1-]

188, 191, 66 L.Ed. 2d 193 (1980); see also *Aimor Elec. Works Ltd. v. Omaha National Bank,* 727 F.2d 688, 692 (8th Cir. 1984).

The Court has reviewed the parties' briefs and believes the jury instructions and rulings during trial were correct and in accord with applicable law. The reasons for the Court's ruling were sufficiently stated during the course of trial. Slathar's single objection to defense counsel's closing argument was not followed with a request for a curative instruction or a motion for a mistrial. Instead, counsel simply awaited the outcome determinative. The case was well tried by able counsel on both sides. There is no reason or legal basis for a new trial.

Based upon a review of the files, records, and proceedings herein, **IT IS ORDERED** That the motion of Plaintiff for a new trial is DENIED.

Dated: March 8, 1995,

_____

Donald D. Alsop, Senior Judge
United States District Court.

[-2-]

EXCERPTS FROM THE
DEPOSITION OF ANITA DARNELL

[Depo. p. 9]

Q. And Pendgraft is Sather's director of human resources basically?

A. I believe that's his title, yes.

Q. [In the phone call to Mr. Pendgraft] ... what was your concern?

A. I felt that because Don was in a protected class both based on his age and his perhaps disability, I though that was a p[retty risky decision to be made.

Q. And what was Mr. Pengraft's response?

A. He Said: I shouldn't be worried about it, that Sather's would take care of it.

[Depo. p. 12]

Q. Do you recall how soon after Mr. Slathar was told that he would be discharge that you called Mr. Pendgraft?

A. I believe it was as soon as I found out.

...

Q To the best you can recall, tell me exactly what you told Mr. Pendgraft.

A. As I Said earlier, when I heard that Don was going to be terminated, I was very concerned based on him being in what I felt was two protected classes, both by age and by disability, and I wanted to make sure that that had been taken into Consideration when tat when that decision was made.

Q. And how long have you been in the human resources personnel function?

A. Probably somewhere in the neighborhood of 18 to 19 years.

Q And I assume that it was because of your experience that you recognized that people can't be discharged because of their age or disability, right?

A. That is correct.

....

Q. What Did you tell Mr. Lindborg [he was the plant manager at the Hopkins, Minnesota facility]?

A. The same thing I told Pendgraft, that I thought it was a very poor decision.

MCDONNELL-DOUGLAS BASED-INSTRUCTIONS: INSTRUCTING THE JURY ON THE DEFENDANT'S PRESUMPTION.

"The progression of age is a universal process. Thus, it is apparent that in the usual case, older workers are constantly moving out of the labor market while younger workers come in. Thus, there is not an automatic presumption of discrimination where a younger worker replaces an older one.

"When an employer's decision is wholly motivated by factors other than age, there is no discrimination. This is even true if the factor motivating the decision to terminate is typically correlated with age; such as pension status, salary, or seniority. The *ADEA* does not make it illegal to terminated an employee simply because he is Paid a high salary.

"An employer is not required to reassign employees whose jobs are eliminated or put employees in a lower echelon, poorer paying jobs with substantial reductions in responsibilities and salary. The issue is ultimately whether the {sic} age

was a determining factor in he decision to discharge the employee, in this case Donald Slathar.

"You are instructed that the focus of your Consideration must be upon Sathers' motivation, and not on your own Consideration of Sathers' business judgment regarding the organization changes that they made. The issue is whether or not Sathers discriminated against Mr. Slathar because of his age." Trans. 778.

INSTRUCTIONS OFFERED BY SLATHAR AND REJECTED BY THE COURT, AFTER THE TRIAL COURT ALLOWED THE MCDONNELL-DOUGLAS PRESUMPTIVE INSTRUCTION FOR THE DEFENSE.

"if you f[ind] Don Slathar's was discharged because of his pay, you may Consider his pay is tied to his experience and age."

From the
MANUAL OF MODEL JURY INSTRUCTIONS, page 72
(dated August 19, 1992)

Your verdict must be fro plaintiff if all the following elements have been proved by the preponderance of the Evidence:

First, defendant [discharged] plaintiff; and

Second, plaintiff's age was a motivating factor in defendant's decision.

If either of the above elements has not been proved by the preponderance of the Evidence, your verdict must be for defendant and you need not proceed further in considering this claim.